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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

13 INTEL CORPORATION and APPLE INC.,
14 Plaintiffs,
15 v.
16 FORTRESS INVESTMENT GROUP LLC,
17 FORTRESS CREDIT CO. LLC, UNILOC
18 2017 LLC, UNILOC USA, INC., UNILOC
19 LUXEMBOURG S.A.R.L., VLSI
TECHNOLOGY LLC, INVT SPE LLC,
INVENTERGY GLOBAL, INC., and IXI IP
LLC,
Defendants.
20

Case No. 3:19-cv-07651-EMC

**DEFENDANTS INVT SPE LLC AND
INVENTERGY GLOBAL, INC.’S
SUPPLEMENTAL REPLY BRIEF IN
SUPPORT OF DEFENDANTS’ JOINT
MOTION TO DISMISS AND TO STRIKE
PLAINTIFF INTEL’S SECOND
AMENDED COMPLAINT**

Hon. Edward M. Chen

[REDACTED VERSION]

1 As this Court recognized, to succeed on their only remaining claims—which are based on
2 what this Court referred to as Plaintiff’s “Patent Aggregation Theory”—Intel must show that the
3 alleged supracompetitive pricing **was the result of** alleged aggregation. *See, e.g.*, Dkt. 229 at
4 24:11-12; *id.* at 26:25-27:2. As to INVT and Inventergy, the only supracompetitive pricing alleged
5 in Intel’s Second Amended Complaint (“SAC”) is by reference to two licensing letters, one from
6 January 2015 and the other from June 2018. SAC at ¶¶ 128-130. INVT/Inventergy’s opening
7 Supplemental Brief explains how those two letters show the opposite of supracompetitive royalty
8 demands as a result of aggregation, instead evidencing licensing offers for specific standard
9 essential patents (“SEPs”) calculated to reflect INVT/Inventergy’s *pro rata* share of the 3G and
10 LTE standards. Dkt. 246.

11 Intel’s opposition does not dispute that those letters show a *pro rata* calculation. In fact, in
12 responding to INVT/Inventergy’s Supplemental Brief, Intel admits that those two letters “relate
13 only to claimed SEPs,” whereas the three specific INVT/Inventergy patents identified in the SAC
14 are non-SEPs. Dkt. 256 at 3:12-13. Thus, Intel asserts that the letters, and the offered royalty rates
15 reflected therein, are “*irrelevant*” to Intel’s remaining claims. *Id.* at 3:11; *see also id.* at 3:17-20
16 (“Because neither letter encompasses non-SEPs, neither is relevant to assessing whether
17 Defendants have been able to demand inflated royalties for the ’579, ’242, or ’620 patents as a
18 result of competition eliminated through the challenged acquisitions.”).¹

19 INVT and Inventergy agree. Indeed, based on Intel’s own admission (and thus setting
20 those two letters aside), Intel has no evidence whatsoever upon which it can plausibly allege
21 **supracompetitive pricing** as to the ’579, ’242, or ’620 patents **as a result** of alleged aggregation of
22 patents by INVT and Inventergy. To the contrary, Intel admits that those three patents are outside
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24 ¹ Intel’s opposition, however, misstates INVT and Inventergy’s argument as what the two
25 licensing letters show. INVT/Inventergy’s argument is **not** that there is no supracompetitive
26 royalty demand because the “[REDACTED].” Dkt. 256 at 2:18-22. Rather, INVT/Inventergy’s argument is that the calculation shown in the two
27 letters demonstrates the offered rates were tied to specific standard essential patents and calculated to
28 reflect INVT/Inventergy’s *pro rata* (proportional) share of patents essential to the 3G and LTE
standards, which is the opposite of a rate based on aggregation. Dkt. 246 at 1-4.

1 the scope of INVT/Inventergy's only prior offers, as the offers were limited to SEPs. Dkt. 256
2 at 3:12-16. Without reference to the royalty rates offered in the two letters, Intel is left with no
3 evidence whatsoever of any alleged supracompetitive prices offered by INVT or Inventergy, let
4 alone supracompetitive prices as a result of aggregation. On this basis alone, Intel's SAC should
5 be dismissed with prejudice as to both INVT and Inventergy.

6 In a blatantly improper attempt to shift theories, obfuscate, and avoid dismissal, Intel now
7 alleges—for the first time in its opposition brief—that its claims against INVT and Inventergy are
8 not based on alleged supracompetitive royalties. Instead, Intel alleges “the letters ***show that***
9 ***Inventergy/INVT are willing to assert patents***, and [Intel is] therefore suffering continuing
10 antitrust injury as a result of the illegal patent acquisition scheme.” *Id.* at 3:20-22. As this Court
11 previously ruled, simply alleging a patent holder is willing to assert patents, without more, and
12 where those patents have not actually been asserted, cannot establish “standing to assert antitrust
13 claims” Dkt. 229 at 1:1-23 (dismissing previously defined “Product Markets (10)-(13)” with
14 prejudice).

15 Here, the evidence in front of this Court shows INVT/Inventergy has never made any
16 assertion at all against Intel based on the identified three patents. To the contrary, the two letters
17 show INVT/Inventergy only ever offered royalties on SEPs, and the SAC contains no allegations
18 to the contrary. Dkt. 247, Ex. 24; Ex. 25; Dkt. 256 at 3:13-16 (letters “have no bearing on . . .
19 demands for those three **non-SEPs**.” (emphasis in original)).²

20 Indeed, even as to the three patents identified in the SAC, the SAC does not allege that
21 Intel has been harmed by INVT or Inventergy in the corresponding markets, instead only
22 identifying harm allegedly caused by other Defendants who have “targeted” Intel or Apple with
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24 ² Even more, such offers were only extended to Plaintiff Apple, who recently filed a notice
25 of dismissal with prejudice as to both INVT and Inventergy. Dkt. 263. The record is devoid of any
26 evidence or allegations that INVT or Inventergy ever even approached Plaintiff Intel on any
27 patent, let alone indicated suit would be filed against Intel. To that end, neither INVT nor
28 Inventergy were even named as Defendants in the original complaint filed only by Plaintiff Intel.
Intel Corp. v. Fortress Investment Group LLC et al., No. 5:19-cv-06856, Dkt. 1 (N.D. Cal. Oct.
21, 2019).

1 their own patents. SAC at ¶¶ 174 (as related to purported market containing the '579 patent), 354
2 (as related to purported market containing the '242 and '620 patents). Moreover, while Intel fails
3 to expressly address this Court's concerns regarding the significance of the '579, '242, or '620
4 patents in their purported markets (e.g. whether such patents are the "crown jewels" in the field or
5 just one of many potential substitutes), by confirming their claims no longer address SEPs, Intel
6 indicates its belief that the significance is low.

7 Intel's three remaining claims against INVT and Inventergy all rise and fall based on
8 Intel's ability (or inability) to plausibly assert that the rates offered by INVT/Inventergy were the
9 result of the aggregation of substitute patents. Intel's admission that the only patents still at issue
10 are non-SEPs, and that INVT/Inventergy have never asserted non-SEPs against Intel (either via
11 letter or lawsuit), confirms Intel's failure to meet that burden. Intel's untimely attempt to change
12 theories to an alleged harm based on "willingness to sue" also fails to meet the "plausibility"
13 standard where the only evidence of record entirely undermines Intel's assertions. Intel's
14 remaining claims against INVT and Inventergy must be dismissed with prejudice. *See Cook,*
15 *Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990) (leave to
16 amend is inappropriate when "the pleading could not possibly be cured by the allegation of other
17 facts.").

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Respectfully submitted,

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